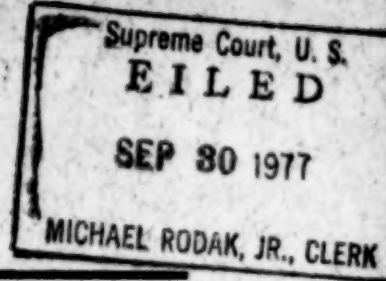


No. 77-146



In the Supreme Court of the United States

OCTOBER TERM, 1977

NEKOOSA PAPERS, INC., PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT**

**BRIEF FOR THE EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION IN OPPOSITION**

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 558 F. 2d 841. The order of the district court (Pet. App. C) is not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1977. A petition for rehearing, with a suggestion for rehearing *en banc*, was denied on June 24, 1977 (Pet. App. B). The petition for a writ of certiorari was filed on July 27, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether conciliation of a discrimination claim is a precondition to intervention by the Equal Employment Op-

portunity Commission in Title VII court actions filed by an aggrieved private claimant.

STATUTE, REGULATION AND RULE INVOLVED

Section 706(f)(1) of the Civil Rights Act of 1964, 78 Stat. 260, as amended, 42 U.S.C. (Supp. V) 2000e-5(f)(1); Section 1601.25b(c) of the Commission's Procedural Regulations, 29 C.F.R. 1601.25b(c); and Rule 24(b) of the Federal Rules of Civil Procedure are set forth in Pet. Apps. E, F and G.

STATEMENT

On December 23, 1974, the Equal Employment Opportunity Commission, pursuant to Section 706(f)(1) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. (Supp. V) 2000e-5(f)(1), sought permission to intervene in a private Title VII action that had been filed on September 9, 1974, by plaintiffs Linda Johnson and the United Paperworkers International Union (Pet. 4-5; Pet. App. A 16).

The private action was based on a charge filed with the Commission on November 29, 1973, that had alleged various discriminatory practices against female employees. The Commission, in a letter of determination (A. 13-14)¹ issued on July 19, 1974, had found reasonable cause to believe that Title VII had been violated and noted that the Commission investigation revealed a *prima facie* case of hiring and assignment discrimination in that females were significantly underrepresented in petitioner's workforce (4.5 percent female workforce compared to 22.4 percent female labor force) and disproportionately assigned to clerical positions (78.5 percent of females were clerical workers). The letter of determination advised the company that a Commission representative would be in contact with it to attempt conciliation (Pet. App. A 16).

¹"A." refers to the joint appendix in the court of appeals.

The charging parties demanded and received from the Commission on August 19, 1974, a "Notice of Right to Sue," as required by Section 706(f)(1) of Title VII and Section 1601.25b(c) of the Commission's regulations (Pet. App. A 16). They then filed suit in the United States District Court for the Western District of Arkansas alleging that petitioner was engaging in a broad pattern of sex discrimination in its hiring, assignment, promotion, transfer, and other employment practices. Plaintiffs sought to represent a class composed of past and present female employees and female applicants, who were denied employment opportunities or refused employment because of their sex. The Commission successfully moved to intervene in the private litigation with a complaint virtually identical in scope to that of the private plaintiffs.

Subsequently, the district court refused to certify the proposed class, restricted the scope of the action to females then employed by the company, and permitted plaintiffs to represent only those female employees who individually intervened. The court then ruled that the Commission complaint would be limited to the narrowed scope of the private action. On appeal, the court of appeals held that, in its complaint in intervention, the Commission is entitled to litigate all allegations of discrimination that it could present in a suit by the Commission based on the charge filed with it. The court of appeals also held that while Title VII does not require the Commission to attempt conciliation as a prerequisite to intervention, such efforts are desirable under the statutory scheme and the district court should stay proceedings for 60 days to permit the Commission to attempt conciliation.²

²The court of appeals dismissed for lack of jurisdiction plaintiffs' appeal from the district court's refusal of class certification. The court of appeals noted, however, that the district court's restriction of plaintiffs' action to female employees, and refusal to certify a class without first allowing discovery as to applicants, may have been inconsistent with established law (see Pet. App. A 22, n. 11, 19, n. 5).

ARGUMENT

Petitioner argues that certiorari should be granted to resolve a conflict in the circuits as to whether the Commission may "file a separate Title VII action covering matters not included in the [previously filed] private action" (Pet. 2).³ That question is not squarely presented by this case, since the Commission never attempted to file a separate Title VII action but rather acted pursuant to its intervention authority under Section 706(f)(1). The question that is raised in this case—whether the Commission may intervene and expand the scope of a lawsuit without prior conciliation of the private claim—arises whether or not the Commission has statutory authority to initiate a second and separate litigation.

³The Courts of Appeals for the Eighth and Tenth Circuits have held there can be only one Section 706(f)(1) suit based on a single charge—if either the Commission or a private party brings suit, the other party is limited to intervention. *Equal Employment Opportunity Commission v. Missouri Pacific R. Co.*, 493 F. 2d 71, 75 (C.A. 8); *Equal Employment Opportunity Commission v. Continental Oil Co.*, 548 F. 2d 884, 889 (C.A. 10). The Third Circuit has held that a private suit has no effect on the Commission's authority to bring suit. *Equal Employment Opportunity Commission v. North Hills Passavant Hospital*, 544 F. 2d 664, 672 (C.A. 3). The Fifth and Sixth Circuits have held that, if the private suit is narrow, the Commission, after completion of the administrative process, may bring a broader suit to vindicate the public wrongs uncovered by its investigation. *Equal Employment Opportunity Commission v. Huttig Sash & Door Co.*, 511 F. 2d 453 (C.A. 5); *Equal Employment Opportunity Commission v. Kimberly-Clark Corp.*, 511 F. 2d 1352 (C.A. 6), certiorari denied, 423 U.S. 994.

We disagree with the position adopted by the Eighth and Tenth Circuits. Even though individual suits, when brought, may not seem to warrant intervention by the Commission, subsequent investigation by the Commission of the individual charge may reveal evidence of more far reaching discrimination which would warrant a Commission action in the public interest.

The Commission often chooses to intervene in private suits raising broadly applicable issues of discrimination, rather than to initiate a separate suit. Where use of a general test is at issue, or where proof of systematic discrimination would be a part of the plaintiff's individual proof,⁴ upon intervention, the Commission would normally seek to allege the broader discrimination that would be proved essentially by the same evidence. Since the issue of the Commission's authority to intervene absent conciliation will arise independently of the availability of a separate suit, resolution of the conflict with respect to the separate suit issue would not alter the decision below and that conflict therefore does not justify a grant of certiorari in this case.⁵

There is no conflict among the circuits as to the issues that are actually presented by this case. No other court of appeals has ruled on the propriety of intervention absent conciliation or the proper scope of an intervention complaint. In addition, the decision below is in accord with those of several district courts,⁶ and with the con-

⁴See, e.g., *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805.

⁵Petitioner acknowledges as much when he states that "[w]hether the U.S. Supreme Court allows the rule of the Eighth Circuit in the *EEOC v. Missouri Pacific R. Co.*, *supra*, [case] (sic) to stand or not, the Supreme Court should decide the remaining important questions of federal law here presented" (Pet. 11). Indeed, the decision below is by the same court of appeals.

⁶See *Willis v. Allied Maintenance Corp.*, 13 FEP Cases 766 (S.D. N.Y.); *Jones v. Holy Cross Hospital Silver Spring, Inc.*, 64 F.R.D. 586 (D. Md.); *National Organization for Women v. Minnesota Mining & Manufacturing Co.*, 11 FEP Cases 720 (D. Minn.); *National Organization for Women, St. Paul Chapter v. 3M Co.*, 14 FEP Cases 1052 (D. Minn.).

Equal Employment Opportunity Commission v. Hickey-Mitchell Co., 507 F. 2d 944 (C.A. 8), cited by petitioner (Pet. 12), was decided by the same circuit as the decision below and does not reflect

gressional intent apparent from the structure of Title VII. The first sentence of Section 706(f)(1) conditions a direct suit by the EEOC upon a failure of conciliation; however, the only statutory prerequisite to intervention is the timely filing of a certification that the case is of general public importance. As explained by the court of appeals below (Pet. App. A 24-25), a requirement that the Commission administratively process a case through failure of conciliation would be inconsistent with the practical exercise of the Commission's authority to seek intervention, because important private suits might be brought before the Commission has completed—or even begun—the often lengthy administrative proceedings that are a precondition to the filing of a separate litigation. Congress was aware of the Commission's administrative backlog of charges (see *Occidental Life Insurance Co. of California v. Equal Employment Opportunity Commission*, No. 76-99, decided June 20, 1977, slip op. 7), and by obviating the need for the Commission to satisfy the administrative prerequisites for direct suit, enabled the Commission to seek timely intervention in accordance with Section 706(f)(1) and Rule 24(b), Fed. R. Civ. P.

Petitioner argues that the Commission's failure to conciliate prior to seeking intervention should at least serve as a bar to expansion of the scope of the case (Pet. 11-12). The instant cause of action was not expanded from that originally filed by the private claimants; plaintiffs' original complaint, which was subsequently narrowed by the district court, raised all the issues that were alleged in the

a contrary view. That case involved the prerequisites to a direct Commission suit, not a suit in intervention. Additionally, that decision reflects the court's concern about the congressional intent to avoid unnecessary litigation under Title VII, a consideration not relevant where the Commission seeks to intervene in on-going litigation.

EEOC's complaint in intervention.⁷ In any event, there is no prejudice to petitioner because the court of appeals required the Commission to attempt conciliation before expanding the scope of the private action. This procedure is in accord with the last sentence of Section 706(f)(1), which authorizes a court to "stay further proceedings for not more than sixty days pending * * * further efforts of the Commission to obtain voluntary compliance." This ruling accommodates all interests. It assures that an employer, faced with allegations broader than those stated in the private action, will have an opportunity to bring itself into compliance,⁸ and at the same time obviates the need for separate lawsuits.

⁷Plaintiffs' complaint was not narrowed by the district court until almost three months after the Commission's motion to intervene had been filed. Here, as in many class action suits, it was not foreseeable that the scope of the private action would be limited. As the opinion below indicates, the limitation was contrary to established law both as to the scope of the private complaint (see *Sanchez v. Standard Brands, Inc.*, 431 F. 2d 455, 466 (C.A. 5)) and the nature of the class (Pet. App. A 23, n. 11, 19, n. 5).

⁸Petitioner's contention that such conciliation attempts would be meaningless (Pet. 12) assumes that the parties have no real desire to conciliate the issues. The court below specifically ordered the Commission to conciliate in good faith (Pet. App. A 26). That the Commission must be satisfied with the proposed resolution of the issues is a requirement in every case. Section 706(f)(1) provides that the Commission may sue "[i]f within thirty days after a charge is filed with the Commission * * *, the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission * * *" (emphasis supplied).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

ABNER W. SIBAL,
General Counsel,
Equal Employment Opportunity Commission.

SEPTEMBER 1977.